The ultimate purpose was to secure to the existing directors of the Prudential Company and the successors whom they should name permanent control of its affairs. This was to be accomplished by having the annual meetings of the Prudential Company before those of the Fidelity Company, so that the board of the latter company would always be elected by the board of the former and would in turn re-elect the old directors of the former. Two minority stockholders of the Prudential Company sought to restrain their directors from carrying out the plan, and an injunction was granted. *Robotham* v. *Prudential Ins. Co. of America*, 53 Atl. Rep. 842. The main ground of the decision was that the plan was *ultra vires*, and in breach of the duty of the directors, as fiduciaries, to the minority stockholders.

It is well settled that directors are in a fiduciary relation to the stockholders, and must manage corporate affairs strictly in the interest of all. *Wardell* v. *Union Pacific R. R. Co.*, 103 U. S. 651. Any arrangement whereby the voting power is separated from the beneficial interest in the stock is obviously likely to be injurious to the interests of the other stockholders, and unless it can be shown to be for the best interests of all concerned, and not in furtherance of the plans of any faction, the arrangement is illegal and will be enjoined. *Kreissl* v. *Distilling Co. of Am.*, 61 N. J. Eq. 5. Indeed it has been held that every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the corporation. *Shepaug Voting Trust*, 60 Conn. 576. If the arrangement in the principal case had been completed, the directors of the Prudential Company need have held only enough shares to qualify. All the vices of the voting trust or pool would thus have been present, with the added feature that the scheme would have been irrevocable and self-perpetuating. There was no imputation of fraud in fact, but it is clear that the plan was mainly, if not entirely, for the benefit of the majority stockholders at the expense of the minority. As a result of it the effective voting power of the minority would have been forever lost, and the value of their shares consequently much diminished, the potentiality of control being very valuable, especially in the case of a corporation with a large surplus to be invested. It seems clear that the use of several millions of the corporate funds to effect such an arrangement was a violation of the rights of the minority stockholders, and was properly enjoined.

The court took the position that the authority to "purchase" stock conferred the right, not to subscribe for a new issue of stock, but only to buy shares already on the market. This seems to be a very narrow construction, in view of the fact that the result is precisely the same in both cases, and that it is frequently much more advantageous to acquire stock by subscription than to buy it later. No other authority seems to go to this length, although one case has been found holding that such power did not authorize subscription for stock in a corporation later to be formed. *Commercial Fire Ins. Co.* v. *Burns*, 99 Ala. 1.

It was also held, and it would seem properly so, that this use of the corporation funds was not an "investment," because the purpose was in no wise to secure from it an income.

ALTERATION OF PRINCIPAL OBLIGATION OR VARIATION OF RISK AS DEFENSE TO SURETY. — A somewhat extreme application of the doctrines regarding variation of a surety's risk is presented in a late Arkansas case.

The defendant was surety on a building contract which contained a clause providing that the employer might direct changes as the work progressed. A change was made, with the contractor's consent, which, while material, did not affect the fundamental features of the contract. It was held that the clause authorizing changes referred only to minor details of the work and that the surety was discharged. *Erfurth et al.* v. *Stevenson*, 72 S. W. Rep. 49. The case applies the general rule that a surety is released whenever the risk assumed by him has without his consent been increased. This principle seems often to have been somewhat confused, in terminology at least, with the entirely distinct doctrine that a surety is discharged if the principal obligation is altered.

The term alteration in this connection is strictly applicable only to actual changes upon the face of a written instrument. See BOUV. LAW DICT. *sub tit. Alteration*. The general rule regarding alteration is that, if material, it entirely avoids the instrument. *Master* v. *Miller*, 4 D. & E. 320, 330. In the case of specialties this rule would seem, in its origin at least, to be based on the technical common law principle that the obligation of a specialty has no existence apart from the document itself. Material alteration of the document would, therefore, be destruction of the obligation itself. *Pigot's Case*, 11 Co. 26 b. The courts, however, have finally held that all written instruments are alike avoided by alteration. *Master* v. *Miller*, *supra*. See DE COLYAR, LAW OF GUARANTEES, 3rd ed. 383. This broad rule seems to be founded, not on any technical doctrine, but upon considerations of policy, — that an obligee who has altered the instrument, or at least failed to preserve it unaltered, has thus destroyed the best evidence of the obligation, and may not bring forward secondary evidence of its contents against the ever-favored surety. *Wood* v. *Steele*, 6 Wall. (U. S. Sup. Ct.) 80. GREENL. EV. 16th ed. § 565. These rules, however, have been relaxed by the courts where the obligee has not acted fraudulently. *Croswell* v. *Labree*, 81 Me. 44; see BRANDT, SURETYSHIP, 2nd ed. § 378.

On the other hand, variation of risk as a defense is based merely on the obvious principle that a surety shall not be held to a liability which is unfair or which lies outside his contract. In one class of cases, the defense seems to be available at law; in another, only in equity. The former cases are chiefly those in which the principal debtor and the creditor agree, without the consent of the surety, upon a modification of an original parol contract. If such change in the contract would in any respect increase the surety's risk, he may, under a legal plea, secure a complete discharge. *Whitcher* v. *Hall*, 5 B. & C. 269. As an equitable defense, variation seems available in any case in which, though the principal obligation may remain unchanged, a transaction takes place between the principal debtor and the creditor which might operate unfairly as against the surety. *Calvert* v. *London Dock Co.*, 2 Keen 638. A common example of this is presented by cases in which the creditor releases security which he holds for the principal debt. In applying the doctrine, however, equity will look to the substantial justice of the situation, and will accordingly still hold the surety liable in so far as the transaction complained of could not have caused him damage. *Dunn* v. *Parsons*, 40 Hun (N. Y.) 77.

The principal case is clearly one of variation of risk, and, assuming the accuracy of the court's interpretation of the clause regarding changes, the holding that a complete defense exists at law cannot be disputed. As to the question of interpretation, the case is more doubtful. It would seem that the object of the clause was to secure a flexibility very desirable in such

contracts, and that a less strict interpretation might, consistently with fairness to the surety, have more nearly effectuated the intention of the parties. *Cf. Drumheller* v. *Am. Surety Co.*, 71 Pac. Rep. 25 (Wash.).

COMPENSATION OF ASSISTANT PROSECUTOR BY PRIVATE PARTIES. — Under the old common law both in England and America prosecution for crimes was left to counsel employed by private parties except in cases where the state was directly interested. Now, however, statutes giving to public prosecutors exclusive control of prosecution, except for certain minor offenses, are universal throughout the United States. An interesting question arising out of this change was recently discussed in the Montana courts. It was held that a district attorney may during the trial receive assistance from counsel privately employed and compensated. *State* v. *Tighe*, 71 Pac. Rep. 3. One judge dissented on the ground that, "The private attorney's client is a stranger to the action. The private attorney represents vengeance. The state's attorney paid by the people is expected to represent justice." Some courts agreeing with this dissenting opinion maintain that to allow privately employed assistants to appear for the state is inconsistent with our theory of criminal prosecution, besides being impliedly prohibited by statutes forbidding the taking of private fees by district attorneys. *Biemel* v. *State*, 71 Wis. 444. The weight of authority, however, even where such statutes exist, is clearly in accord with the principal case. *State* v. *Bartlett*, 55 Me. 200; *Keyes* v. *State*, 122 Ind. 527.

Under the old law compensation necessarily came from private sources in many cases. The private employment of assistant prosecutors was thus proper formerly, and there has been no express prohibition of the practice since. The only question then is whether the change in our system of prosecution for crime has impliedly excluded all private interference and aid. Criminal prosecution is now strictly an affair of the state. It is and always must be under the control of counsel employed by the government, and they as public officers cannot delegate their power. The ideal, it may be said, toward which our law is tending is the elimination of the idea of individual vengeance. The prosecuting attorney should seek the conviction and punishment of the prisoner, not for the satisfaction of the injured persons, but for the protection of society and the effect on the criminal himself. As a representative of the state he seeks the promotion of justice and occupies a position similar to that of the judge. In the management and the withdrawal of prosecutions he has important discretion. That he may be free to act in accordance with justice and the public interests he must remain independent and free from all obligation to the parties interested in securing convictions. The private employment of an assistant, it is urged, will inevitably introduce into the prosecution an undesirable element of partisanship.

In such an argument there is undoubtedly much force. If, however, the official public prosecutor himself is forbidden to receive compensation from private parties, and is left in full control, the policy underlying the statutes would seem to be well satisfied. The interest of the state will then be the paramount influence. All that the private attorney can do is to help forward that interest and so incidentally to satisfy his client. It is desirable that the state's attorney should be allowed to receive all necessary aid that he may successfully prosecute the guilty. Justice is best promoted, not by